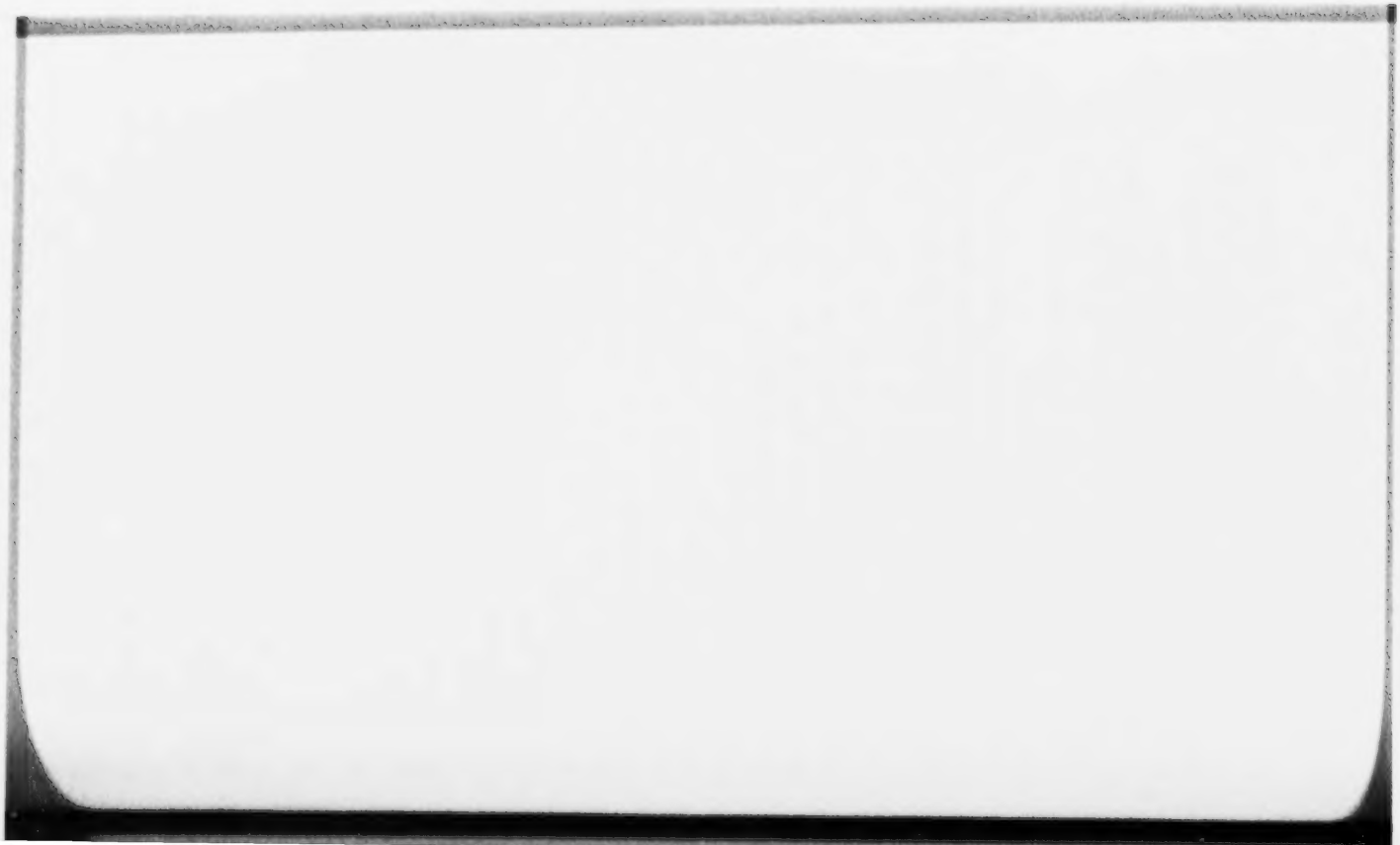

JUL 27 1973

In the Supreme Court of the United States

OCTOBER TERM

No. 72-1592

CAROLEE BIDDY,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Biddy* v. *State*, 277 So.2d 115 (Miss. 1973) and is attached hereto as Appendix A.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The single question posed by petitioner in her application for Writ of Certiorari does not arise under the specific factual circumstances involved in this cause. In conformity with the factual circumstances revealed in the court below, an appropriate redrafting of petitioner's issue would be as follows:

Whether the decision of this Court in *Miranda* v. *Arizona*, 384 U.S. 436, bars from admission into evidence the statements made by a defendant who has twice received the full advisory and signed effective waivers and twelve days thereafter, without invoking the assistance of counsel known to defendant to be available, verbally acknowledges the rights have been previously given and are remembered and understood before making an incriminating statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The single issue posed by petitioner is clearly within the scope of the constitutional requirements as expressed in *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), however the issue presented does not warrant expressed or codified judicial interpretation.

STATEMENT OF THE CASE

The first trial of petitioner for the murder of her five year old retarded stepdaughter, Mona, began on May 24, 1971, and resulted in a mistrial. On August 30, 1971, a

second jury trial was held in the Circuit Court of Jackson County, Mississippi, and on September 5, 1971, petitioner was convicted of the crime of manslaughter and was sentenced to serve a term of twenty years in the state penitentiary. The Mississippi Supreme Court affirmed the conviction and denied a petition for rehearing. (*Biddy* v. *State*, 277 So.2d 115 (Miss. 1973)).

During the first trial on May 26, 1971, an evidentiary hearing was conducted outside the presence of the jury regarding the admissibility under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), of statements made by petitioner on December 27 and 28, 1970, to law enforcement officers. By stipulation the entire proceedings of this evidentiary hearing and "the previous objections made by counsel for the defendant" were made a part of the record of the second trial and defense counsel orally objected "[t]o the admissibility of the statement in its entirety . . ." (R. 53) and, among other things, ". . . we object to each of the acts that were subsequent to the commission of the crime. . . ." The ruling of the trial judge was limited to ". . . the—shall I say voluntariness or meeting the Miranda requirements as to the overall admission of her so-called statement, and I will rule as I did at the previous trial, in the absence of the jury, where I ruled that that is admissible." (R. 54) Reserving his ruling on the other objections, the judge then held, "I will rule that the Miranda requirements have been met, the constitutional requirements have been met, and that the statements are admissible." "I'll overrule the objection as to the subsequent acts. I think they are admissible." (R. 55)

In her motion for a new trial petitioner contended "[t]he Court erred in allowing the statement of the defendant made on December 27, 1970, to be introduced in evidence, in violation of the Fifth, Sixth, and Fourteenth

Amendments to the Constitution of the United States. (Brief for Appellant, pp. 14-25)

On the morning of December 3, 1970, petitioner Carolee Biddy telephoned the Jackson Police Department to report that her mentally retarded five year old stepdaughter, Mona Biddy, was missing. (R. 62) Two officers went to the Biddy home and, after obtaining a description from Mrs. Biddy, began to search the house and immediate vicinity. (R. 70-74) An extensive search was conducted which eventually involved the Jackson Police Department Task Force, Jackson Police Department Officers, the Juvenile Department, approximately three or four hundred National Guardsmen and innumerable citizen volunteers. (R. 120, 130) Five days later, on December 8, Mona Biddy's body was found on the water's edge of the Ross Barnett Reservoir, over thirteen miles from the Biddy home. (R. 147, 294)

Detectives Reeves and Price of the Jackson Police Department conducted the investigation from beginning to end. They first visited the Biddy home on December 4, 1970, and were in close touch with the Biddys during the following weeks. Detective Reeves testified that he talked to petitioner "practically every day" between December 4 and December 15 (R. 278) and went to the Biddy home almost daily, "Most of the time at their request." (R. 301) When Detective Price was asked if Mr. Biddy requested the detectives to talk to him, Price replied, "He requested it several times. He wanted to know what we knew, and I would say that during this period of time he called maybe once every day or every two days to our office, wanting to get in contact with us. Sometimes it'd be two times a day." (R. 341-342)

In a discussion at the Biddy home, Reeves and Price had mentioned an article of clothing which Mona had been

wearing which Mrs. Biddy could not recall. Consequently, the detectives called petitioner on December 15 and "asked her to accompany them to headquarters to identify the article." (R. 279, 339) "She said she'd be glad to come up and look at it, if we would come and pick her up. She didn't have a ride." (R. 279) Upon her request, the detectives called Mr. Biddy and told him what they were going to do; he was at their office when the detectives returned with petitioner. (R. 379-80, 419) After the clothing had been identified Reeves and Price said they would like to talk to each of them about the disappearance; the Biddys agreed and Mrs. Biddy entered a conference room with Reeves, Price, and County Attorney Tom Zebert. (R. 280, 340)

Before she was questioned, Mrs. Biddy was advised of her rights. First, Detective Price read the Miranda warnings from a standard waiver form. (R. 340, 351)

Price asked Mrs. Biddy about her education; she replied that she was a high school graduate and had worked as a secretary for an engineering firm. (R. 340)

County Attorney Tom Zebert described the advisory as follows:

> "And then he [Reeves] said, 'Now we need to talk to you particularly, but before we do, we want to advise you of all your rights, and we will advise you of them and then let you sign a statement to that effect, if you want to.'
>
> So, this is the statement that was read by Detective Price to her, and he read it to her at a fairly slow rate, and after he had read that to her, she made the indication that she did—she said she wanted to sign it that she understood what was being said.

I then took the statement and said to her, 'Mrs. Biddy, we need to make sure that you understand of what this entails, and what it means.'

I told her each one of the rights that are on here separately. For instance, I asked her: (Reading)

'Before we ask you any questions, you must understand your rights. You have the right to remain silent. Do you understand that?' And she said she did. I told her 'Anything you say could be used against you in a court of law,' and she said that she understood that.

And we told her she had a right to talk to a lawyer for advice before you are asked any questions and you can have him with you during questioning and she said she understood that.

She said she understood all of the rights, and I am convinced that she did understand them." (R. 363-364)

Reeves and Price were also convinced that she understood her rights and she voluntarily signed a waiver to that effect at 11:45 a.m. (R. 300, 366) They asked petitioner some questions about Mona's disappearance; she denied any involvement in it. "She became a little emotional and we ceased our questioning." (R. 282)

Later that afternoon, at the Mississippi Highway Patrol, Mrs. Biddy was again advised of her rights by Dewey Williams, Assistant Director of the Bureau of Identification. Mr. Williams asked her to read the Miranda warnings printed on a waiver form, which she did; he then asked if she understood:

A: She said that she understood it, and she knew what her rights were.

Q: She understood and knew what her rights were?
A: Yes sir. She said they previously have [sic] been explained to her. (R. 370)

After assuring Mr. Williams that she knew her rights, Mrs. Biddy signed a second waiver about 3:00 p.m. on December 15. (R. 370, 372) Mr. Williams testified that petitioner appeared normal in every respect. (R. 369)

The Biddys went home. Later that evening, Detectives Reeves and Price went to the Biddy home because they "were asked several times to come out to their home that night and talk to them." (R. 422) Mr. Charles Wright, whom the detectives knew to be a lawyer and a friend of the Biddys, was present although neither Reeves or Price knew whether Mr. Wright had been retained as Mrs. Biddy's lawyer. (R. 284, 308) The following transpired:

> We [Reeves and Price] talked to Mr. Biddy. Mrs. Biddy was in the bedroom, and finally she came out, and Mr. Biddy wanted us to talk to her, and Mr. Wright made the statement "this is not the time and place for that," and we agreed, and we left. (R. 284)

On the following night, December 16, a stabbing incident was reported at the Biddy home. The Biddys specifically requested the presence of Detectives Reeves and Price. Reeves testified as follows:

> After I had gotten off duty and I had gone home, sometime before midnight, I received a call from the Biddy home that Mrs. Biddy had been attacked, and they wanted me out there right away.
>
> I advised that some other officers would probably be there, and they said they wanted me. So, I called Lieutenant Price at home . . . and we went out there. (Tr. 284)

Mrs. Biddy had slight wounds on her hip allegedly inflicted by an unknown attacker in her back yard. Reeves and Price, along with the two assigned detectives, conducted an investigation and concluded that Mrs. Biddy's story was "illogical." (R. 285) Mrs. Biddy admitted on December 27 that she staged the incident. (R. 291)

At 11:35 p.m. on December 27, Mrs. Biddy again called the police station, this time to report that her 2½ year old daughter, Candice, had been abducted. (R. 285)

Detective Reeves was requested by the Biddys to come out to the house, although he was off duty at the time. (R. 285) He and two other detectives investigated Mrs. Biddy's story: "She said someone came in the window, came by Mr. Biddy [allegedly asleep on a couch in the same room], went in and got Candice, and went back out the window, tying up the dog, and putting him into the closet." (R. 286) The child was found near a ditch several years behind the house. The temperature was 26° F (R. 269, 271); the baby's diaper was found in the ditch, frozen. (R. 274) Candice was taken to a doctor for examination by a detective and Mr. and Mrs. Biddy. (R. 271) The detective found no evidence to bear out the story; Mrs. Biddy later admitted that she had also staged this incident. (R. 291)

While Reeves was at the Biddy home on December 26, he was told that Mr. and Mrs. Biddy were going to Georgia the next day to the home of Mr. Biddy's father. (R. 288) He asked Mr. Biddy to notify him before they left town.

> All during the investigation we had talked to Mr. and Mrs. Biddy, and we told Mr. Biddy that any time that we found any facts about that case that he should know, we would . . . tell him about it.

> Several things had been brought to our attention that we thought he ought to know, he wanted to know. (R. 288)

Mr. Biddy said he would call before leaving. (R. 288)

Early on the morning of December 27, Detectives Reeves and Price went to the Biddy home and searched the back yard for evidence of Candice's abduction; finding none, they left. (R. 288) Around midmorning, they returned to the Biddy home and talked to Mr. Biddy. "We told him we had something we'd like to talk to him about before he left for Georgia. He advised he'd call us before they left. He wasn't sure when he was going to leave at that time." (R. 309) On that same morning, the officers were in their car talking to another man when Mal Sims, Mr. Biddy's business partner, "came over and met us." (R. 309) They talked to him ". . . to get his opinion of what was going on. He knew the family more—much better than we did." (R. 310) Reeves had no recollection of saying anything about Mrs. Biddy needing psychiatric help (R. 310) or the possibility of committing her:

> Q: And there was no mention in your presence, by either you or Mr. Price, of Mr. Biddy . . . either committing her, or that you were going to have to call his father and get it done?
> A: No, sir. (R. 310)

Reeves said that he called Mr. Biddy's father because "Mr. Sims told me that Mr. Biddy's father had called him, and wanted to talk to me, and I told him that I'd be glad to talk to him later, and I did call him later." (R. 310) He returned the call "to find out what he [Biddy's father] wanted" and because ". . . he was looking for them [Mr. and Mrs. Biddy] over in Georgia, and we told him that we were going to talk to him that morning, and they might

be late coming over there." (R. 311) When asked by petitioner's attorney whether he mentioned that Mrs. Biddy had mental problems which required treatment, Reeves replied, "I don't remember saying that, and I don't see why I would say it, because I didn't believe that at the time." (R. 312) He knew she had received shock treatments over a year before, but the psychiatrist had told the officers ". . . that she had passed the test, and as far as he was concerned, she was sound." (R. 313)

About 11:00 a.m., Reeves and Price received a call from Mr. Biddy, ". . . saying they were ready to go, and that he would like to talk to us." (R. 289) Mr. Biddy requested that the officers come to his home.

> "We went out and told him that we had several things that we would like to talk to him about and tell him, and asked him would he like to go down to police headquarters, he and Mrs. Biddy, before he left town, and he said, 'if you have something to tell me, I'll be glad to go.'
>
> He said 'let me talk to my wife.' They conferred in the back room and came back out and said 'we'd like to go down.' They left in their car and drove to the police station." (R. 289)

Detective Price testified as follows about the purpose of the visit to the Biddy home: "He [Biddy] wanted to meet us out there . . . He wanted to know what we had found out, and what we knew." (R. 352) When asked why the officers asked the Biddys to go to police headquarters, he replied, ". . . we just have a policy we rather talk to people . . . headquarters, if we can," and that the Biddys "both agreed" to the request. (R. 343)

Before leaving, Mr. and Mrs. Biddy walked over to Mal Sims and asked him to call the firm's attorney, Mr.

Charles Wright. (R. 391) The following exchange between petitioner's attorney and Detective Reeves reveals a conflict between Reeves' testimony and Mr. Biddy's testimony that he informed the officers that he had contacted an attorney and did not want Mrs. Biddy questioned until he arrived.

> Q: Did you know about . . . the request at that time that their family lawyer come down there to see them?
> A: I don't know now where I got the information . . . I don't know whether Mr. Price heard it, or whether I heard it, but that Mr. Mal Sims was going to call tgeir [sic] lawyer for them.
> Q: To have the family lawyer there when you got to the police station?
> A: No. He just said he was going to call one. He didn't say when he'd be there, or did they want to see him that day or the next day. They said he had called—
> Q: But you knew he was coming down there, did you not?
> A: I didn't know when. In fact, all I knew was that Mr. Sims was going to call a lawyer. That's the extent of my information.
> Q: And the purpose of calling a lawyer was to have him there at the police station, was it not?
> A: I don't know the purpose. No one told me the purpose. (R. 316)

Both Reeves and Price testified that Mr. Biddy requested only that he be present when Mrs. Biddy was questioned; the officers agreed. (R. 289, 344)

The Biddys were then taken to separate conference rooms; the detectives talked first to Mr. Biddy. They informed him of the results of their investigation so far:

that Mrs. Biddy did not receive clothing in exchange for modeling for a local dress shop, that they had found no evidence supporting her story that she regularly attended a health club, and that they believed she staged the stabbing and abduction incidents. He agreed with them about the two staged incidents. (R. 290) Reeves testified that Roy Dunn, Mrs. Biddy's ex-husband, may have been mentioned; however, he could not recall what, if anything was said about him. (R. 320) Price was also unsure of what was said about Dunn: "Right now I don't recall what was said about Mr. Dunn, other than that he had been questioned in the case, and possibly, that he was calling out at the house regularly, checking on the children [of Dunn and Mrs. Biddy]." (R. 353) When asked why they gave Mr. Biddy all this information, Reeves and Price gave no indication that they wanted to use him as their agent; rather, they consistently replied that Mr. Biddy had requested complete information throughout the case.

> Q: Why did you want to tell him these things?
> A: He has asked us many times that if we found out anything that he should know, to let him know. (R. 317)
>
> * * *
>
> Q: What was the purpose of telling him that?
> A: He wanted to know everything that we had found out in this case, and we wanted to tell him what we thought he should know. (R. 353-354)

Under close questioning by petitioner's attorney, neither Reeves nor Price indicated that they sought to use Mr. Biddy as an agent to extract a confession from his wife. (R. 318, 355)

> Q: Did you think he would talk with Mrs. Biddy then?

A: I thought it was important to the investigation that he knew that some of these things that Mrs. Biddy had been telling him were false.

Q: Because it would help you in getting him to talk with her?

A: We never asked him to talk to her. He asked to talk to her. (R. 318)

Since the officers also wanted to talk to Mrs. Biddy, and Mr. Biddy had requested that he be present when they talked to her, they asked her to come into the room where they all were. The following statements by Reeves explain the officers' presence during the conversation between Mr. and Mrs. Biddy:

"He said 'I'd like to talk to my wife,' and we brought her over to the room that he was in. He said nothing about talking to her alone. (R. 329)

If he had asked us to leave him alone, we would have left him alone. (R. 329) We might have asked him would it be all right for us to be represented. I know we did stay, and if he said that he wanted to talk to her alone, we would have left. (R. 329)

He accepted what we said, and he said he believed it, and he'd like to talk to his wife." (R. 329)

Mr. Biddy began to talk to his wife, but before very much was said, the phone rang and Reeves was informed that Mr. Wright was downstairs:

"I immediately went downstairs and met Mr. Wright, and brought him up to third floor, and he said he'd like to talk to Mr. Biddy. I went into the room and told Mr. Biddy, went in and got Mr. Biddy and took him out to Mr. Wright and they conferred.

> While they were gone, Lieutenant Price and I were in the room with Mrs. Biddy, and I told her that we would like to ask her some questions, and I said 'Do you understand your rights? You have been advised of your rights before' and she said, 'Yes, she understood them.'" (R. 291)

No questions had been asked by the officers before Wright arrived. (R. 323) The officers did not prevent Mrs. Biddy from talking to Mr. Wright (R. 346); she made no attempt to do so, although he stood in the door for a few minutes after talking to Mr. Biddy. (R. 291)

> Q: Was Mrs. Biddy aware of the fact that Mr. Wright was there?
> A: He came to the door, and the door was open. She was sitting right by the door. They did not talk, but he talked to Mr. Biddy. (R. 291)

Mr. Wright told Detective Reeves that . . . "he was not going to get involved in the case . . . he was friends of the family, and he didn't want to get involved." (R. 325) Although Mr. Biddy testified that he told Charles Wright that he needed someone to protect Mrs. Biddy's rights (R. 398), he then returned to the room and continued questioning her while Reeves was out of the room conferring with Wright:

> At that time Mr. Biddy came back, and I went out and conferred with Mr. Wright for a short time. He told me that he was ill, and he was going home, and that Mr. Poole would come up to the office later.
>
> I went back into the room—and he left. I went back into the room with Mr. and Mrs. Biddy, and *at that time Mr. Biddy was questioning Mrs. Biddy* about four different instances. (R. 431) (Emphasis added)

Detective Reeves' *full* answer to the question whether he knew another lawyer was "on his way up" is as follows: "Yes, sir. I knew he was trying to get another lawyer, was going to try to get you [John Poole], or said he was, and also Mr. and Mrs. Biddy knew that there was a lawyer coming, too." (R. 325)

Mr. Biddy questioned Mrs. Biddy about the four incidents the officers had mentioned, and she admitted ". . . that she had not worked for the clothing store, . . . not having gone to the health studio as regularly as she had claimed . . . that she had faked the stabbing, and had faked the abduction." (R. 291) "At this time, Mr. Biddy became very emotionally upset," but Mrs. Biddy was only " a little emotional, not very much . . . like she wanted to tell him something." (R. 291-292)

Then Detective Reeves questioned petitioner for the first time:

> "At this time I told her 'Mrs. Biddy, now is a good time to tell Mr. Biddy if you were involved in the disappearance of Mona.' I told her that Mona was gone, she wouldn't—couldn't come back, and that she [Mona] was afflicted, that the doctors had told us she [Mona] would never get any better, and that now would be a good time to talk to her husband.
>
> "They were sitting facing each other, holding hands. She looked straight at Mr. Biddy, and said 'Ted, I am sorry I did it.' She said 'Ted, I didn't mean to do it.'" (R. 292)

Mrs. Biddy then told the officers that she found Mona dead, panicked, and took the child's body to the reservoir. (R. 292-294, 345-346)

Detective Reeves, after waiting a few minutes because petitioner had become "a little bit emotional" after mak-

ing her statement, asked her "if she would mind" him taking her statement in writing. (R. 294) She agreed, and Reeves requested that Mr. Biddy read her the rights listed on the paper upon which he was to type the statement:

> "I said, 'now, I want you to be sure that you understand what type of paper I'm going to type it on. This is the list of rights you have been advised of before. I would like for Mr. Biddy to read them to you again, so you'll know again what it is all about.'
>
> Mr. Biddy took a sheet like this, and he read each right to her, and the waiver, and she began telling the story again, and I started typing it. (R. 295)
>
> Q: Did you know why you needed to read rights to her again since a lawyer was already on his way up there?
>
> A: The reason—she had already stated she understood her rights, but I was going to type it on this piece of paper, and these rights were right above it, and I wanted him to read it so she would know what I was typing was on the same sheet of paper with her rights. Now, as far as her understanding her rights, we were convinced she did, but we wanted him to read them." (R. 334)

Shortly after Reeves began typing, he received a call that John Poole was downstairs. Reeves immediately went downstairs to talk to him, brought him upstairs, and called Mr. and Mrs. Biddy out; the three of them conferred privately in another room. (R. 295) When Mr. Poole informed the officers that he did not want petitioner to sign any statements, Reeves immediately took her partial statement out of the typewriter. (R. 296) Mr. Poole soon left, telling petitioner he would see her the next day. (R. 296) Reeves conferred with Chief of Police Tullos and then arrested Mrs. Biddy for the murder of Mona Biddy. (R. 458-459)

Both Reeves and Price testified that they had neither prevented Mrs. Biddy from talking to Charles Wright or John Poole nor prevented those attorneys from talking to her. (R. 296, 346-347) At no time on December 27 did Mrs. Biddy tell the officers that she did not want to talk to them any more. (R. 338, 348) Both detectives repeatedly denied saying anything to Mr. Biddy about putting petitioner in a hospital or having treatments. (R. 322, 356-357) Reeves denied saying anything about being under pressure to settle ugly rumors or clear the case up. (R. 331) Nor did Reeves try to encourage her to say she killed Mona accidentally or make promises about not bringing charges.

> Q: Did you state that you believed it to be an accident?
> A: No sir. I may have said if it was an accident, and if something did happen, tell about that. I told her to tell just whatever happened, no matter what it was; whether it was an accident, whether she was involved in—
> Q: And you told her that if it was an accident, there would be no charge?
> A: No sir, I didn't say that.
> Q: Do you deny saying that?
> A: I didn't say it, no sir.
> Q: Did Mr. Price say this?
> A: I don't remember him saying it.
> Q: Could he have stated it?
> A: I don't see why he would. I didn't hear him say it. (R. 332)

Under cross-examination by John Poole, Reeves said twice that he did not remember Poole telling him that he did not want Mrs. Biddy to talk with the officers any further. (R. 333)

Before Mr. Poole arrived, the officers had asked petitioner if she would go out to the Ross Barnett Reservoir and point out the spot where she had left Mona's body; "she said she'd be glad to." (R. 296) He told her they would do it the next day, and she agreed. On the morning of December 28, Reeves told her at least twice that she was not required to go:

> "I went up to the jail and talked to Mrs. Biddy, and asked her if she still wanted to take us out to the reservoir, and she said 'yes,' that she had told us the truth, and she wanted to get it all straight.
>
> So, we [Reeves and Price], we took her from the jail, and got . . . the lady from the juvenile office, Nancy, and we went downstairs to get in the car, and again I told her, said 'Mrs. Biddy, you don't have to go out there if you don't want to,' and she said 'I want to go. I want to get it all straightened out.'
>
> So we got in the car, and we drove down Jefferson Street to I-55. As we got out near a road to turn off to go to the road across the dam, we told her 'from this point on, we'd like for you to tell us every place to turn. We're not going any place except where you tell us.'
>
> So she directed us from there on." (R. 297)

Petitioner directed them to the place where the body had been found and gave detailed instructions about her route there and even the wrong turns she had taken. (R. 298) Both Detective Price and Juvenile Officer Nancy McAleer heard Reeves tell Mrs. Biddy that she didn't have to go to the reservoir and heard her answer that she wanted to get everything straightened out. (R. 347, 376) Nancy McAleer testified, "They told her twice to

my recollection, that she didn't have to go." (R. 379) Both also confirmed the fact that Mrs. Biddy voluntarily directed the driver to the spot and that all directions were given by her. (R. 347, 376-377) During the ride back, the officers asked petitioner to review what she had told them earlier, which she did. (R. 378)

The officers took Mrs. Biddy back to the police station rather than to the jail, because they knew Mr. Poole was coming to see her sometime that morning. They waited for him at the police station. (R. 299) Petitioner asked Reeves . . . "why she had to stay in jail overnight, after she had obtained a lawyer," and Reeves explained. (R. 326)

> "And we conversed a little bit. She had previously mentioned something that had happened in jail, something that was funny. We were just, more or less, making conversation, and she said something else about you, and I said 'he is a fine lawyer,' and jokingly, without any malice, I said 'the last case I was on where Mr. Poole was the defense attorney, his client got forty-five years.' "
> Q: All right. Then, this was a joke, I believe you said?
> A: That's the way I meant it, and that's the way she took it, because we talked about it, and I again assured her that you were a fine lawyer, and that's the truth. (R. 326)

During the same conversation, petitioner and Reeves further discussed her attorney in the following manner:

> Q: Did you state anything to the effect that I wasn't interested in her, that I was interested only in a football game?

A: No sir, not in that context . . . Not in that way, no sir. I might have mentioned about you being there and that you left to go watch a football game, but not in those words, no sir.

Q: Do you know why you mentioned it?

A: I don't know. She and I were just talking. She probably brought it up, I'm not sure. (R. 328)

Nancy McAleer confirmed Reeves' testimony: ". . . she said something about why you didn't spend more time talking to her, and he said that you had said that you were watching the ballgame, something like that." (R. 380) This entire conversation took place one day after Mrs. Biddy had made her statement and also after she had pointed out the location of the body. (R. 379-380)

The officers and Mrs. Biddy then returned to the police station and shortly thereafter Mr. Poole came to the station to talk to her. (R. 299)

On the basis of this testimony the trial judge ruled:

I'll overrule the motion [to suppress] for the reason that under the testimony of Mr. Biddy, that throughout Mrs. Biddy had the advice of their family counsel, and even on the day of the alleged statement, he appeared at the door, spoke to Mr. Biddy.

In other words, in my opinion, throughout she had been advised of her constitutional rights, she signed a waiver, not just one time but on several instances, and I am of the opinion that the statement is admissible.

And as to the other point that you raised, I am also of the opinion that the two so-called hoaxes are admissible in this case. (R. 414)

REASONS FOR DENYING THE WRIT

No question of substance is presented by petitioner's assertion that she was denied her constitutional rights when the trial court admitted into evidence her statement which was immediately preceded by her verbal acknowledgement that she remembered and understood the rights which had been explained to her in full on two occasions twelve days before at which times she signed waivers, the validity of which is unchallenged.

Furthermore, petitioner's assertion that the officers induced incriminating statements after an attorney who had been obtained for petitioner by her husband left the police station due to illness and before the arrival of a second attorney known by the officers to be on his way to see petitioner is simply not supported by the record.

On the contrary, the record clearly shows that counsel for petitioner did appear at the police station and spoke to petitioner's husband and one of the officers and even stood in the open doorway of the interrogation room where petitioner was seated but at no time nor in any manner did she or her husband who was present the entire time express or even indicate a desire to have an attorney present during the questioning.

ARGUMENT IN SUPPORT OF JUDGMENT AND IN ANSWER TO PETITIONER

WHETHER THE DECISION OF THIS COURT IN *MIRANDA V. ARIZONA,* 384 U.S. 436, BARS FROM ADMISSION INTO EVIDENCE THE STATEMENTS MADE BY A DEFENDANT WHO HAS TWICE RECEIVED THE FULL ADVISORY AND SIGNED EFFECTIVE WAIVERS AND TWELVE DAYS THEREAFTER, WITHOUT INVOKING THE ASSISTANCE OF COUNSEL KNOWN TO DEFENDANT TO BE AVAILABLE, VERBALLY ACKNOWLEDGES THE RIGHTS HAVE BEEN PREVIOUSLY GIVEN AND ARE REMEMBERED AND UNDERSTOOD BEFORE MAKING AN INCRIMINATING STATEMENT.

In reaching the decision in *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), four cases having common features were considered. "In each, the defendant was questioned (by law enforcement officials) in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process . . . [t]hey all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." 384 U.S. at 445.

Against this backdrop, *Miranda* sought to guarantee that "the constitutional rights of the individual could be enforced against overzealous police practices." 384 U.S. at 444. The multiple issues arising from the decision, generally speaking, may be divided into two categories; the first is whether *Miranda* requirements are applicable to the particular case, and the second is whether the *Mi-*

randa requirements have been met in cases where they are applicable as indeed they are here. To be considered under this general issue are the questions of whether the warnings were adequate, whether waiver of rights is clearly demonstrated and whether the suspect was competent to waive. Respondent believes each question is answered in the affirmative here.

On December 15, petitioner, age 32 years and a high school graduate with a record of employment as a secretary with an engineering firm, was given the full *Miranda* advisory. After each of the rights was read to her she was given an opportunity to ask any questions she wished about them. She said she understood and signed a waiver. (R. 300, 306, 340) That same afternoon she was again informed of her rights and stated she knew and understood them as they had previously been explained to her. A second waiver was signed. (R. 368-371)

Twelve days later, on December 27, petitioner and her husband and Detectives Reeves and Price were seated in a conference room at the police station when Reeves received a telephone call that Wright was downstairs and wished to speak to Ted Biddy who then stepped outside the room to confer with him. (R. 290) Detective Reeves testified:

> "While they were gone, Lieutenant Price and I were in the room with Mrs. Biddy, and I told her we would like to ask her some questions, and I said 'do you understand your rights? You have been advised of your rights before.' And she said yes, she understood them." (R. 290, 291)

"At that time, Mr. Biddy and Mr. Wright came back. Mr. Biddy came into the room, Mr. Wright stood at the door [appellant was seated right by the door]. He had

told me previously that he was ill, and would have to go home. So, he left." (R. 291) Wright said he would get another lawyer, Mr. Poole, to come up there for him. (R. 325)

> At that time, Mr. Biddy began to talk to Mrs. Biddy, and asking her about these different instances, about the clothing store, about the health studio, about the stabbing and the kidnapping.
>
> She admitted that she had not worked for the clothing store, and she partially admitted not having gone to the health studio as regularly as she had claimed to be going.
>
> She admitted that she had faked the stabbing, and had faked the kidnapping. (R. 291)

At this point, Reeves told appellant now was a good time to tell Mr. Biddy if she was involved in Mona's disappearance and that Mona was gone and couldn't come back, that she was afflicted, that the doctors said she would never never get any better, "that now would be a good time to talk to her husband."

> They were sitting facing each other, holding hands. She looked straight at Mr. Biddy, and said "Ted, I'm sorry I did it." She said, "Ted, I didn't mean to do it." (R. 292)

Lt. Reeves then asked if she would mind his taking the statement in writing.

> She said "I told you the truth. Is there any reason for that?" I said "Well, we would like to have a record of it." She said "Well, I told you", and I told her that if something should happen to me, or Mr. Price, we would like this for our files, and she said "all right".

> I said "now, I want you to be sure that you understand what type of paper I'm going to type it on. This is the list of rights that you have been advised of before. I would like for Mr. Biddy to read them to you again, so you'll know again what it is all about."
>
> Mr. Biddy took a sheet like this, and he read each right to her, and the waiver, and then she began telling the story again, and I started typing it. I typed two or three lines, and the phone rang and my office told me that Mr. Poole was downstairs. (R. 295)

Lt. Reeves talked to Mr. Poole who then had a conference with appellant and her husband. Poole said he did not "want her signing any statements." "I immediately took the statement out of the typewriter, and put it down. Mr. Poole told her he would see her the next day, and he left shortly after that." (R. 296)

It is undisputed that the two advisorys and waivers given on December 15 comported with the *Miranda* mandate. Thus, the issue here is whether, after full warnings are administered at an initial interrogation session, it is necessary to repeat the warnings prior to each subsequent session. The general rule is that warnings need not be repeated. *Miller* v. *United States*, 396 F.2d 492 (8th Cir. 1968), cert. denied 393 U.S. 1031; *Tucker* v. *United States*, 375 F.2d 365 (8th Cir. 1967), cert. denied 389 U.S. 888 (1967). This same rule has been applied to instances when the sessions are days apart. *Maguire* v. *United States*, 396 F.2d 327 (9th Cir. 1968), cert. denied 393 U.S. 1099 (1969) [warnings three days earlier held sufficient]; *State* v. *Magee*, 52 N.J. 352, 245 A.2d 339 (1968) [warnings 2-1/2 days earlier held sufficient]; *People* v. *Long*, 69 Cal. Rptr. 698 (1968) [warnings 18 hours earlier held sufficient]. Failure of the police to repeat the Miranda warning prior to the taking of de-

fendant's third and fourth "in custody" statements was assigned as error in *State* v. *Rowe*, 468 P.2d 1000 (Wash. 1970):

> Defendant was properly informed of his rights at the time of his arrest and again before giving his first and second written statements. Miranda does not require the police to make repeated recitations of a defendant's constitutional rights before the taking of each subsequent statement. State v. Blanchey, 75 Wash. Dec. 2d 935, 454 P.2d 841 (1969); State v. Lucia, 74 Wash. 2d 819, 447 P.2d 606 (1968). Having been informed of his rights three times and having intelligently waived them, statements taken within the next 48 hours cannot be said to have been made without knowledge of his rights.

Apparently these decisions spring from the rationale of *People* v. *Hill*, 39 Ill.2d 125, 233 N.E.2d 367 (1968):

> To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by Miranda. Gorman v. United States, 380 F.2d 158, 164 (1st Cir.).

Adverting to the issue of waiver, petitioner urges that the State failed to sustain the heavy burden, imposed by *Miranda*, of demonstrating that at the time the incriminating statement was given, "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain an appointed counsel." *Miranda* at 475, 86 S.Ct. at 1628. In *United States* v. *Hayes*, 385 F.2d 375 (4th Cir. 1967), cert. denied 370 U.S. 1006, 20 L.Ed.2d 106, 88 S.Ct. 1250 (1968), it was held:

> In reiterating the strong presumption against waiver and the high standards of proof needed to overcome

this presumption, the Court in Miranda relied upon Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), in which the Court unequivocally stated:

> The determination of whether here has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, supra, 304 U.S. at 464, 58 S.Ct. at 1023. Similarly, in a post-Miranda decision, the Fifth Circuit observed:

> "* * * the cases in which it is clear that the warnings have been given must be considered on their own facts in order to determine the question of waiver. The courts must do this on an ad hoc basis, since no per se rule has thus far been adopted dealing with this problem."

To the same effect is the ruling in a more recent case, *United States* v. *Hilliker*, 436 F.2d 101 (9th Cir. 1970), cert. denied 401 U.S. 958, 28 L.Ed.2d 242, 91 S.Ct. 987 (1971).

> Determining the validity of a waiver of Miranda rights is a difficult but necessary judicial task. Over-willingness to find that there was a valid waiver could subvert the goals of the Miranda decision. Yet the imposing of too stringent a standard for finding waiver could hamper law enforcement more than is reasonably required to protect individual constitutional rights. See Comment, 36 U.Chi.L.Rev. 413 (1969). Courts must determine the validity of a waiver of Miranda rights on an ad hoc basis looking carefully to the particular circumstances of the case.

Cf. *Narro* v. *United States*, 370 F.2d 329 (5th Cir. 1966), cert. denied 387 U.S. 946, 18 L.Ed.2d 1334, 87 S.Ct. 2081 (1967) and *Pettyjohn* v. *United States*, 419 F.2d 651 (D.C. Cir. 1969), cert. denied 397 U.S. 1058, 25 L.Ed.2d 676, 90 S.Ct. 1383 (1970).

That counsel can be waived as well as demanded is undisputed. Furthermore, as stated in *State* v. *Ruiz*, 251 Ore. 193, 444 P.2d 32, 33 (1968), "after the warnings are given and knowingly and understandingly understood by the suspect, the burden is upon the suspect to invoke his known rights." Where, as here, two waivers are signed and subsequently a verbal affirmation that the previously given admonitions are known and understood, there can be no doubt that waiver has unequivocally been demonstrated. Certainly it is also deserving of emphasis that at no time did appellant, her husband (who was present throughout the entire first statement) nor her attorney (who was also present and aware that petitioner was seated in the interrogation room with the investigating officers) ever indicate in any manner a desire to have the interrogation be delayed or ceased until an attorney was present. At this point, it should be emphasized that petitioner's claim that the officers attempted to utilize her husband as their agent is totally without merit and completely unsupported by the record.

As stated in *Jennings* v. *United States*, 391 F.2d 512, 515 (5th Cir. 1968), cert. denied 393 U.S. 868, 21 L.Ed.2d 136, 89 S.Ct. 154 (1968):

> "[W]hat the Court sought to interdict in Miranda were those situations in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take 'no' for an answer."

Certainly this is not a case where the police refused to take "no" for an answer. Conversely, what is presented are circumstances wherein the officers fully complied with the basic thrust of *Miranda* which is to equalize the parties in the interrogation room and give the suspect the opportunity to call a halt to the questioning. The case at bar evidences none of the "overzealous police practices" criticized in *Miranda* but rather presents a picture in which the officers, throughout the entire investigation, scrupulously insured the fact that petitioner was afforded every constitutional protection due her.

Nor were the requirements of *Miranda* subverted in any way when, on the day following her arrest and after being repeatedly instructed that she did not have to do so, she accompanied the officers to the reservoir. It is on this point that *Miranda* is most explicit:

> Volunteered statements *of any kind* are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. 384 U.S. at 478

Detective Reeves testified:

> I went up to the jail and talked to Mrs. Biddy, and asked her if she still wanted to take us out to the reservoir, and she said "yes," that she had told us the truth, and she wanted to get it all straight.
>
> So, we [Reeves and Price], we took her from the jail, and got . . . the lady from the juvenile office, Nancy, and we went downstairs to get in the car, and again I told her, said "Mrs. Biddy, you don't have to go out there if you don't want to," and she said "I want to go. I want to get it all straightened out." (R. 297)

The volunteered statement is admissible regardless of whether it was made while in custody, after indictment or after counsel was retained. *Spurlin* v. *State,* 218 So.2d 876 (Miss. 1969) [in custody]; *Mobley* v. *State,* 161 S.E.2d 834 (Ga. 1968) [in custody and after conferring with his lawyer]; *State* v. *McKnight,* 243 A.2d 240 (N.J. 1968) [in custody; counsel assigned by court but had not seen defendant]; *Commonwealth* v. *Franklin,* 265 A.2d 36 (Pa. 1970) [in custody and after counsel was requested]; *People* v. *Kaye,* 250 N.E.2d 329 (N.Y. 1969) [in custody and represented by counsel who was not present when statement was volunteered.]

Finally, as noted in *Boulden* v. *Holman,* 394 U.S. 478, 22 L.Ed.2d 433, 89 S.Ct. 1138 (1969), "[t]he question whether a confession was voluntarily made necessarily turns on the 'totality of the circumstances' in any particular case." 394 U.S. at 487. See also: *Clewis* v. *Texas,* 386 U.S. 707, 18 L.Ed.2d 423, 87 S.Ct. 1338 (1967); *Greenwald* v. *Wisconsin,* 390 U.S. 519, 20 L.Ed.2d 77, 88 S.Ct. 1152 (1968); *Darwin* v. *Connecticut,* 391 U.S. 346, 20 L.Ed.2d 630, 88 S.Ct. 1488 (1968); *Frazier* v. *Cupp,* 394 U.S. 731, 22 L.Ed.2d 684, 89 S.Ct. 1420 (1969).

Upon a consideration of the circumstances attendant the making of the subject statements, the trial court determined that the defendant knowingly, intelligently and voluntarily waived his constitutional rights after having received the appropriate warnings. The trial judge, on the whole record, found the confession to be voluntary; the Mississippi Supreme Court found no error and accepted the determination of the lower court that the record did not disclose the constitutional rights of the defendant had been violated or infringed upon in any manner.

CONCLUSION

Respondent respectfully submits that the petitioner was very much aware of her constitutional rights which she elected to waive before making her statement. The petitioner's circumstances pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for Writ of Certiorari should in all justice be denied as being without merit.

Respectfully submitted,

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CERTIFICATE

I, Karen Gilfoy, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief In Opposition to Petition For A Writ of Certiorari to the Supreme Court of Mississippi to F. Lee Bailey, Esquire, Mark J. Kadish, Esquire, and John R. Truman, Esquire, One Center Plaza, Boston, Massachusetts.

This, the 20th day of July, A. D., 1973.

KAREN GILFOY
Special Assistant Attorney General